Filed 7/22/19 Bates v. Aghakhani CA6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ANTHONY M. BATES,

Plaintiff and Appellant,

v.

ARMOND AGHAKHANI et al.

Defendants and Respondents.

2d Civil No. B293961
(Super. Ct. No. 56-2017-00493476-CU-MM-VTA)
(Ventura County)

Anthony M. Bates brought a malpractice action against respondents Armond Aghakhani, his dentist, and Armond Aghakhani, D.D.S., a Professional Corporation. Bates appeals from the judgment entered after the trial court had granted respondents' motion for summary judgment. The motion was granted because the court had ordered that respondents' request for admissions be deemed admitted by appellant because appellant failed to respond to the request. The deemed admissions were fatal to appellant's case.

Appellant contends that the trial court (1) abused its discretion in refusing to vacate the order deeming the requested

admissions admitted, (2) abused its discretion in denying his motion to continue the summary judgment hearing so that he could conduct further discovery, and (3) was biased against him and his counsel and treated them unfairly. We affirm.

Procedural Background

Appellant's complaint alleged causes of action for dental malpractice, fraudulent misrepresentation, and "battery in that [appellant] did not consent to the painful and offensive touching in the manner performed by [respondents]." On August 8, 2017, respondents served on appellant a request for admissions. The requested admissions were that (1) respondents "owed no duty of care to [appellant]," (2) respondents' dental treatment of appellant "was within the standard of care for dentists in the dental community," (3) no act or omission by respondents "was a proximate cause of injury to [appellant]," (4) respondents "never made any misrepresentations to [appellant] regarding . . . his dental treatment," and (5) appellant gave informed consent for the dental treatment.

Appellant did not respond to the request for admissions. On December 8, 2017, respondents filed a motion to deem the requested admissions admitted by appellant. (See Code Civ. Proc., § 2033.280 ["If a party to whom requests for admission are directed fails to serve a timely response, . . . [¶] . . . [¶] (b) The requesting party may move for an order that . . . the truth of any matters specified in the requests be deemed admitted . . . . [¶] (c) The court shall make this order, unless it finds that the party to whom the requests for admission have been directed has served,

before the hearing on the motion, a proposed response to the requests for admission"].)[1]

The notice of motion mistakenly said that the motion would be heard at 8:30 a.m. on January 11, 2017. The correct date was January 11, *2018*. Since the motion was served and filed in December 2017, it would be obvious that the motion would be heard in 2018, not 2017.

On January 11, 2018, the trial court granted respondents' motion for an order deeming the requested admissions admitted. The minutes show that the court convened at 8:51 a.m. and that appellant's counsel was not present. The court imposed a monetary sanction against appellant pursuant to section 2030.290, subdivision (c). In March 2018 respondents served and filed a motion for summary judgment.

On June 7, 2018, five months after the court had ordered that respondents' requested admissions be deemed admitted, appellant filed an ex parte application to vacate the order. On June 11, 2018, the trial court denied the ex parte application "without prejudice to [appellant] bringing a noticed motion for relief." Ten days later, on June 21, 2018, the court denied without prejudice appellant's new noticed motion for the same relief. The trial court said it had denied the latter "motion on the grounds that [appellant] had not been diligent in seeking relief from the order deeming the requests for admissions to be admitted and that counsel had demonstrated neglect, but not of the excusable variety." The court observed that the latter motion "was heard on improperly shortened notice."

---

[1] All statutory references are to the Code of Civil Procedure.

In July 2018, the court granted respondents' motion for summary judgment. The court reasoned: "As [appellant] concedes, the effect of the requests for admissions having been deemed admitted compels this result. To the extent that [appellant's] evidentiary showing in opposition [to the motion for summary judgment] contradicts the requests for admission which have been deemed admitted, the latter must prevail."

In opposing the motion for summary judgment, appellant renewed his request to vacate the order deeming the requested admissions admitted. At the same time that the court granted the motion for summary judgment, it ruled: "The Court, upon further reflection . . . , finds that [appellant's] counsel's declarations attempting to explain her neglect and delay in seeking relief lack credibility and are not believable. Further, the Court finds that [appellant's] counsel's declarations seeking relief from the default demonstrate *inexcusable*, not excusable, neglect, as well as an unreasonable and inexplicable lack of diligence. [¶] Accordingly, the Court declines [appellant's] request to be relieved of the effect of the order deeming the requests for admissions to be admitted."

Facts Alleged in Support of Appellant's Request to Vacate the Order Deeming Requested Admissions Admitted

Appellant's counsel declared: "The hearing on the discovery motions were [*sic*] set for January 11, 2018. I discovered that the discovery responses were mistakenly just placed in this case files because it had been noticed for January 11, 2017. I knew that the discovery had been completed because I had driven to Ventura County and met with [appellant] in August, 2017. But I had not received [respondents'] responses to discovery which are still to this date incomplete. I did not

discover the error until January 2, 2018, when I pulled the file to work on the opposition to [respondents'] demurrer. I immediately telephoned Defense counsel . . . and [unsuccessfully] requested a continuance of the January 11, 2018 hearing date."

"On January 11, 2018, I had brought an Opposition to the motion . . . , the Responses to the Requests for Admissions, Responses to Form Interrogatories, Requests to Production and production materials to the hearing. My copying machine broke down that morning as I had all the discovery completed and they just needed copying which were very voluminous with production as well. The Responses to Special Interrogatories itself was about 50 pages so I had to move to another machine and I ran a little later than planned to go to Kern [*sic*] County courthouse. [¶] . . . In any event, I arrived at the Ventur[a] County courthouse at about 8:45 a.m. I have hip replacement so the screening alarms went off, necessitating a personal scan. I had to wait for the personal scan and, therefore, did not reach [the courtroom] until 9:00 a.m. I was surprised to learn that the hearing had been conducted and everyone had left."

The court clerk gave counsel a copy of the minute order, and she "glanced at" it. She saw that the court had imposed sanctions against her. She did not see that the court had ordered that the requested admissions be deemed admitted. Because of an eye problem for which she later had surgery, counsel "was having difficulty seeing." "Even then," counsel asserted, "having been in this legal field for over 50 years, I had never experienced a judge deeming the admissions admitted without ordering a time to respond."

Counsel continued: "When the Motion for Summary Judgment arrived, I merely glanced at it because I had a heavy

hearings and trial calendar, and did not notice the admissions until I was preparing for [respondents'] deposition on June 1, 2018. At which time I immediately took action to file the ex parte application which was heard on June 11, 2018." "This was definitely my mistake, inadvertence, surprise or neglect and not my client's doings."

We Must Look Through the Summary Judgment to the Order Deeming the Requested Admissions Admitted

"Because the trial court granted summary judgment solely based on the deemed admissions, we must look through the summary judgment to the deemed admitted order and determine whether" the court erred in refusing to grant relief from this order. (*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 977 (*Wilcox*).) If the trial court should have permitted appellant to withdraw the deemed admissions, "then the summary judgment based on those admissions is . . . infirm, and the resulting judgment must be reversed. [Citation.]" (*Brigante v. Huang* (1993) 20 Cal.App.4th 1569, 1587, disapproved on other grounds in *Wilcox*, *supra*, 21 Cal.4th at p. 983, fn. 12.)

The Court Had Discretion to Vacate the Order Deeming Requested Admissions Admitted

"[A] deemed admitted order establishes, by judicial fiat, that a nonresponding party has responded to the requests by admitting the truth of all matters contained therein. [Citation.]" (*Wilcox*, *supra*, 21 Cal.4th at p. 979.) "'Matters that are admitted or deemed admitted through [request for admissions] discovery devices are conclusively established in the litigation and are not subject to being contested through contradictory evidence.' [Citations.]" (*Stover v. Bruntz* (2017) 12 Cal.App.5th 19, 30, first brackets in original.)

"[S]ubdivision (m) [of former section 2033] permits the withdrawal . . . of admissions deemed admitted for failure to respond." (*Wilcox*, *supra*, 21 Cal.4th at p. 975.) Section 2033 was repealed in 2005. Section 2033, subdivision (m) was replaced by section 2033.300, which provides in subdivision (b), "The court may [not "shall"] permit withdrawal . . . of an admission only if it determines that the admission was the result of mistake, inadvertence, or excusable neglect, and that the party who obtained the admission will not be substantially prejudiced in maintaining that party's action or defense on the merits." The identical language was included in former section 2033, subdivision (m).

A trial court has discretion whether to grant the withdrawal of deemed admissions. "The trial court's discretion in ruling on a motion to withdraw . . . must be exercised in conformity with the spirit of the law and in a manner that serves the interests of justice. Because the law strongly favors trial and disposition on the merits, any doubts in applying section 2033.300 must be resolved in favor of the party seeking relief." (*New Albertsons*, *Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1420.)

On the other hand, "[t]he policy that the law favors trying all cases and controversies upon their merits should not be prostituted to permit the slovenly practice of law or to relieve courts of the duty of scrutinizing carefully the affidavits or declarations filed in support of motions for relief to ascertain whether they set forth, with adequate particularity, grounds for relief. When inexcusable neglect is condoned even tacitly by the courts, they themselves unwittingly become instruments undermining the orderly process of the law. [Citation.]" (*Transit*

Ads, *Inc. v. Tanner Motor Livery*, *Ltd.* (1969) 270 Cal.App.2d 275, 282.)

Here, "the nonresponding party [appellant] can only escape a binding admission by establishing 'mistake, inadvertence, or excusable neglect' and no substantial prejudice to the propounding party. [Citation.]" (*Wilcox*, *supra*, 21 Cal.4th at p. 982.)

The Record Is Inadequate to Determine Whether the Trial Court Abused Its Discretion

In the absence of an abuse of discretion, we will not disturb a trial court's exercise of discretion. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*); *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1493.) "'Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' [Citations.]" (*Denham*, *supra*, at p. 566.) "'In determining whether a trial court abused its discretion . . . , "we consider the record before the trial court when it made its ruling."' [Citation.]" (*People v. Thomas* (2012) 53 Cal.4th 771, 798.)

The record on appeal is inadequate to determine whether the trial court abused its discretion in denying appellant's request to withdraw the deemed admissions. The court denied the request on three separate occasions: (1) the June 11, 2018 denial of the ex parte application for relief; (2) the June 21, 2018 denial of the subsequent noticed motion for the same relief; and

(3) the July 2018 denial of the renewed motion made in opposition to respondents' motion for summary judgment. On each occasion, the court denied the request after a hearing at which the parties presented oral argument. It is reasonable to infer that the court based its denial and credibility findings not only on appellant's counsel's written declarations, but also on counsel's statements at the hearings. The record does not include a reporter's transcript of any of the three hearings. Nor is there an agreed or settled statement in lieu of a reporter's transcript. (See Cal. Rules of Court, rules 8.130(h), 8.134, 8.137.) We therefore have no way of knowing what was said at the hearings. The minute orders show that the trial court found appellant's neglect to be inexcusable, but they do not disclose the court's underlying reasoning. That reasoning may have been disclosed by the court's remarks at the hearings. Since a court acts within its discretion if it does not exceed the bounds of reason, the court's reasoning is important. "The absence of a record concerning what actually occurred at the hearing[s] precludes a determination that the court abused its discretion. [Citations.]" (*Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259.)

"As the party challenging [the denial of the request to withdraw deemed admissions], [appellant] has an affirmative obligation to provide an adequate record so that we may assess whether the trial court abused its discretion. [Citations.] We cannot presume the trial court has erred." (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447.) "'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. . . .'" (*Denham*, *supra*, 2 Cal.3d at p. 564.)

Because appellant failed "to furnish an adequate record of the challenged proceedings, his claim on appeal must be resolved against him. [Citations.]" (*Rancho Santa Fe Assn. v. Dolan–King* (2004) 115 Cal.App.4th 28, 46; see also *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1141.)

Our resolution of this issue is supported by *Schwartz v. Schwartz* (1959) 173 Cal.App.2d 455. There, the court concluded: "The order [reducing attorney fees] recites that there was a hearing had at which both sides appeared and were presumptively heard. Such oral proceedings, with statements of counsel and court, are not before us. On the basis of the record before us we cannot say that the trial court's order was outside the pale of reasonable propriety nor that it in any way abused its discretion." (*Id*. at p. 458.)

In any event, as we discuss below, the trial court did not abuse its discretion even if appellant is deemed to have provided an adequate record of the trial court proceedings.

The Trial Court Did Not Abuse Its Discretion

The trial court did not exceed the bounds of reason in concluding that appellant's counsel's neglect was inexcusable. We defer to the court's finding that "counsel's declarations attempting to explain her neglect and delay in seeking relief lack credibility and are not believable." (See *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 479 ["The trial court, with declarations and supporting affidavits, was able to assess credibility"]; *In re Marriage of Nurie* (2009) 176 Cal.App.4th 478, 492 ["With respect to purely factual findings, we will defer to the trial court's assessment of the parties' credibility, even though the determination was made on declarations rather than live testimony"]; *Cowan v. Krayzman* (2011) 196 Cal.App.4th 907, 915

["The trial court—who, unlike us, was also able to assess Krayzman's counsel's credibility in person—could reasonably find his declaration not credible. We have no basis to disturb this finding on appeal"].)

Moreover, the trial court reasonably concluded "that [appellant's] counsel's declarations seeking relief from the default demonstrate *inexcusable*, not excusable, neglect, as well as an unreasonable and inexplicable lack of diligence." "Neglect is excusable only if a reasonably prudent person in similar circumstances might have made the same error. [Citations.] Relevant factors in assessing counsel error include: '(1) the nature of the mistake or neglect; and (2) whether counsel was otherwise diligent in investigating and pursuing the claim.' [Citation.] 'Conduct falling below the professional standard of care . . . is not therefore excusable.' [Citations.] 'To hold otherwise would be to eliminate the express statutory requirement of excusability and effectively eviscerate the concept of attorney malpractice.' [Citation.]" (*Huh v. Wang* (2008) 158 Cal.App.4th 1406, 1423 (*Huh*).)

In her declaration, appellant's counsel did not explain why she had failed to timely respond to the requested admissions before the January 11, 2018 hearing. The request for admissions had been served on August 8, 2017, so she had five months in which to serve a response to the request.

On January 11, 2018, the court clerk gave appellant's counsel a copy of the minute order deeming the requested admissions admitted and imposing monetary sanctions. According to counsel, she "glanced at [the order] and saw the awarding of sanctions to the defense." She allegedly did not see that respondents' requested admissions had been deemed

admitted. Counsel explained: "On January 11, 2018, I was having difficulty seeing. . . . I had an eye operation on May 22, 2018, so that I can see more clearly now." But since counsel was able to see the order imposing sanctions, she surely could also have seen the order deeming the requested admissions admitted if she had taken the time to read the order. Her failure to read the order fell "'below the professional standard of care'" and "'is not therefore excusable.'" (*Huh*, *supra*, 158 Cal.App.4th at p. 1423.)

Counsel declared: "When the Motion for Summary Judgment arrived, I merely glanced at it because I had a heavy hearings and trial calendar, and did not notice the admissions until I was preparing for [respondents'] deposition on June 1, 2018." But "the fact that counsel 'was busy with other matters during the relevant period . . . standing alone would not constitute excusable neglect.' [Citations.] [¶] To constitute grounds for relief, an exceptional workload generally must be accompanied by some factor outside the attorney's control that makes the situation unmanageable, such as a mistake 'caused by a glitch in office machinery or an error by clerical staff.' [Citations.] . . . [¶] No such clerical mistake or extraordinary circumstance appears here. No clerk or legal assistant misfiled the papers. [Citations.] . . . Counsel's declaration does not establish that [s]he was unaware of the summary judgment motion. [Citation.]" (*Huh*, *supra*, 158 Cal.App.4th at p. 1424.) The motion for summary judgment clearly stated, "[Appellant's] admissions . . . are dispositive of the elements of [his] claims." This statement was set forth under the heading, "**EFFECT OF ADMISSIONS**."

Appellant argues, "[A]n attorney's declaration of fault provides mandatory relief to inexcusable mistakes. [Appellant's] attorney in accepting responsibility for some mistakes, thereby invokes the mandatory relief provisions of . . . section 473." The mandatory relief provision (§ 473, subd. (b)) provides, "[T]he court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect."

The mandatory relief provision of section 473, subdivision (b) is inapplicable here. It applies only when the attorney's mistake, inadvertence, or neglect "will result in entry of a default judgment" or a "dismissal." (*Ibid*.) Appellant's counsel's failure to respond to the request for admissions did not result in entry of a default judgment or dismissal. It resulted in an order deeming the requested admissions admitted, which in turn led to the granting of respondents' motion for summary judgment. "Summary judgments are neither defaults, nor default judgments, nor dismissals. [Citation.] The explicit statutory language of section 473(b) thus 'provides no basis for extending the mandatory provision' to such judgments. [Citation.] In the words of Justice Epstein, 'to read the mandatory provision of . . . section 473 to apply whenever a party loses his or her day in court due to attorney error goes far beyond anything the

Legislature has done.' [Citation.]" (*Huh*, *supra*, 158 Cal.App.4th at p. 1417.)"

Furthermore, the language of section 2033.300, subdivision (b) makes clear that deemed admissions may be withdrawn only as provided in that section: "The court may permit withdrawal . . . of an admission *only* if it determines that the admission was the result of mistake, inadvertence, or excusable neglect . . . ." (Italics added; see also *Wilcox*, *supra*, 21 Cal.4th at p. 982, italics added ["the nonresponding party can *only* escape a binding admission by establishing 'mistake, inadvertence, or excusable neglect' and no substantial prejudice to the propounding party"].)

The Trial Court Did Not Abuse Its Discretion in Denying Appellant's Motion to Continue the Summary Judgment Hearing

We reject appellant's claim that the trial court abused its discretion in denying his motion to continue the summary judgment hearing so that he could conduct additional discovery. Since appellant's deemed admissions were fatal to his opposition to the motion for summary judgment, further discovery would have been futile.

The Trial Court Fairly Conducted the Proceedings

Appellant contends that the trial court "[e]xhibited extreme bias for [appellant's] counsel by never considering other reasons for not moving sooner and, '[h]anging his hat' on ad hominem attacks against [appellant's] attorney, e.g., 'in light of [appellant's] counsel's inexcusable neglect' without looking at the merits of [appellant's] case." Appellant continues: "[T]he Trial Judge wanted to make sure that the admissions deemed admitted would destroy [appellant's] case to the end and that's what ending [*sic*] up happening." Thus, "[n]either Appellant . . . nor his attorney was treated fairly and justly."

Our review of the record has persuaded us that the trial court was not biased and that it treated appellant and his counsel fairly.

Court of Appeal Argument

At oral argument, appellant's counsel accused opposing counsel of engaging in "egregious gamesmanship." She accused the trial judge of "judicial misconduct." She said that the "judge who handled" the mandatory settlement conference told her: "The [trial] judge . . . is having personal problems. He does not want this trial on Monday. I want you to dismiss the case because the [trial] judge doesn't want a trial." Counsel declared, "I was a frickin' scapegoat, and there's no other way you can look at it."

The record does not support counsel's accusations. At oral argument she admitted that there is no record of the mandatory settlement conference.

Disposition

The judgment is affirmed. Respondents shall recover their costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Matthew Guasco, Judge

Superior Court County of Ventura

RoseAnn Frazee for Plaintiff and Appellant.

Brian P. Kamel & Associates, Brian P. Kamel and Yee O. Lam for Defendants and Respondents.